IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants,	)	
vs.	)	No. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' REPLY BRIEF

Joseph A. Filippelli, Esq.
Messrs. Filippelli & Eisenberg
450 Sansome Street, Suite 406
San Francisco, California 94111

Attorneys for Appellants

Edwin L. Miller, Jr., Esq.
United States Attorney
Mobley Milan, Esq.
Assistant United States Attorney
325 West "F" Street
San Diego, California 92101

Attorneys for Appellee

INDEX

TABLES OF AUTHORITIES CITED

CODES CITED

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants,	)	
vs.	)	No. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' REPLY BRIEF

STATEMENT OF FACTS AND PLEADINGS

DISCLOSING JURISDICTION

The Court has jurisdiction to review the final judgment of conviction of each of the appellants of the offense of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174 on the ground that 28 U.S.C. 1291 provides for appeal to the courts of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court. The trial in this matter, before the Honorable William P. Copple, Judge, was held without a jury in the United States District Court for the Southern District of California at San Diego on June 14, 1967. On June 15, 1967, Judge Copple

adjudged each appellant guilty "on both counts" (21 U.S.C. 173 and 21 U.S.C. 174). On the same date, appellants made a motion for a new trial and said motion was denied. On July 31, 1967, Judge Fred Kunzel ordered that each of the appellants be committed to the custody of the attorney general or his authorized representative for imprisonment for a period of seven years on the count alleging a violation of 21 U.S.C. 173 and seven years on the count alleging a violation of 21 U.S.C. 174. The seven-year sentences were to run concurrently. The indictment specified only a violation under 21 U.S.C. 174 (RT 2). On the same day, notice of appeal to the United States Court of Appeals for the Ninth Circuit was made by the appellants. On September 11, 1967, appellants were granted an extension of time to October 9, 1967, for filing the designation of documents pending the appeal. On September 29, 1967, said designation of documents on appeal was filed with the United States District Court.

STATEMENT OF THE CASE

Appellants' appeal the judgment of the conviction against them pursuant to a trial without jury resulting finally in a judgment of guilty and a sentence of imprisonment of each appellant for two terms of seven years, to run concurrently. Appellants' appeal is directed to the determination that each of them is guilty of the crimes of smuggling

and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174. Appellants maintain that the District Court erred in finding appellants guilty; that there was insufficient evidence to find appellants guilty; and that the District Court erred in failing to dismiss the indictment as to both appellants.

SPECIFICATION OF ERRORS

1. Count One of the indictment is defective, and it was an error to enter a judgment of guilty thereon.

2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

4. There was insufficient evidence to find appellant Johnnie Charles Murray guilty.

5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty.

ARGUMENT

In a "Statement of Facts" preceding the argument, the appellee makes repeated references to alleged discrepancies in statements by appellants Johnnie Charles Murray and Lonnie Melvin Murray concerning addresses and time. Customs Agent

Randolph R. Aros testified that Johnnie stated that he lived in Los Angeles. However, Agent Aros was unable to specify whether the address given by Lonnie was on 38th, 68th, 86th or Central (RT 39, 41). This testimony is so uncertain that it fails to show any discrepancy by Lonnie. The alleged discrepancy as to time is even less impressive. The discrepancy amounts to nothing more than whether the brothers arrived at Tijuana at noon or 1 P.M. and whether they separated at 3 or 4 P.M. Their testimony concerning their purpose for going to Tijuana and their activity there clearly indicates that they were not keeping close track of time. They went there "to have fun" (RT 104).

Although it is not clear what relevance these discrepancies have to any issue in this case, appellee lays so much emphasis on them that they deserve some mention so that appellants may dispose of them.

1. Count One of the indictment is defective and it was error to enter a judgment of guilty based thereon.

Appellee cites White vs. United States (9 Cir. 1968) 394 F.2d 49. In the White case, a violation of 21 U.S.C. 174 was charged in each count. In Count One of the indictment against the appellants, 21 U.S.C. 174 is never mentioned. That is the difference.

2. The principle that certain taxing and registration provisions are violative of rights against self-incrimination is applicable here.

Appellee takes the position that the privilege against self-incrimination is violated only if the prosecution is pursuant to 26 U.S.C. 4721 and 26 U.S.C. 4722. Apparently if that step is dispensed with and prosecution is taken directly under 21 U.S.C. 173 and 21 U.S.C. 174, appellee contends that the privilege is not violated. Such reasoning avoids the issue. The plain fact is that had the appellants, or one of them, had presented the narcotics for taxing and registration purposes there would have been an exposure to substantial hazards of incrimination. It may well be that the Government would not have permitted the narcotics to enter the United States in any event. However, that question could not be determined until an application was made for permission for importation. Therefore, the facts of this case come within the holding in Marchetti vs. United States (1968) 390 U.S. 39, Gross vs. United States (1968) 390 U.S. 62, and Haynes vs. United States (1968) 390 U.S. 85.

3. No act of smuggling or importing occurred as a matter of law.

Appellee has narrowed the issue on this question considerably by agreeing that appellants were convicted of smuggling. Appellee even cites Williamson vs. United States (9 Cir. 1962) 310 F.2d 192, which defines the term "smuggling." Appellee also cites Palermo vs. United States (1940) 112 F.2d 922,

in which the only reference to Keck vs. United States (1899) 172 U.S. 434 is in an entirely different context. The rule in this Circuit is set forth in Wong Bing Nung vs. United States (9 Cir. 1955) 221 F.2d 917.

It is appellee's contention that by merely moving the customs station back 5, 50, 500 or 1,500 feet from the international boundary, an act of smuggling has been completed. The consequences of such reasoning are obvious. Any person coming from Mexico with a straw hat in his suitcase has smuggled the hat for 5, 50, 500 or 1,500 feet. Because such a person has had no opportunity to declare the straw hat, the straw hat is still undeclared and concealed. A customs officer, under appellee's theory, could intercept that person at any point between the international boundary and the customs station, seize the suitcase and charge that person with smuggling. Such reasoning is not acceptable. The decision in Keck vs. United States, supra, cannot be so circumvented. Furthermore, in the Keck case, contraband was aboard a ship berthed in the port of Philadelphia at the time it was taken by the customs agent. In this Circuit, Keck vs. United States, supra, was followed in Wong Bing Nung vs. United States, supra, when the contraband was found upon a vessel in San Francisco Bay. It is absolutely clear that that San Francisco Bay is well within the territory of the United States. By these standards, it is clear that there

was no completed act of smuggling by appellants.

4. There was insufficient evidence to find appellant, Johnnie Charles Murray, guilty.

In appellants' opening brief, the evidence against Johnnie Charles Murray is discussed, including the testimony concerning Johnnie's childhood accidents and lapses of memory, and this need not be repeated.

On May 13, 1968, subsequent to the submission of appellants' brief on April 11, 1968, there was first published the decision of this Court in Henderson vs. United States (9 Cir. 1967) 390 F.2d 805. Because this case raises a substantial constitutional question concerning the legality of the search of Johnnie, it is respectfully requested that this Court consider the rule in Henderson vs. United States, supra, even though the question is raised at this late date. In the Henderson case, this Court states at page 808:

> "Thus every person crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. The mere crossing of the border is sufficient cause for such a search. Even 'mere suspicion' is not required. We assume that the same rule would apply to the contents of his or her purse, wallet, or pockets. If, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required."

Therefore, to justify a strip search of Lonnie, there must have been "at least a real suspicion" directed specifically to Johnnie. Customs Inspector Rudolph L.

Dale testified as to this question on page 29, line 5, to page 30, line 5, of Reporter's Transcript dated June 14, 1967:

"A I asked them their citizenship. They told me they were born in the United States. I asked them what they purchased in Mexico. They declared nothing.

"I had the driver get out and open the trunk and it was negative. Then I came around to the passenger's side and talked to the passenger, Johnnie, which is the gentleman to the left with the blue kerchief in his suit. So I talked to them and I decided to -- right then and there to take the car to secondary inspection.

"Q All right, and --

"A I had them both --

"Q Did you go to secondary with them?

"A Yes, sir, I did.

"Q All right, then what happened?

"A I escorted both subjects into the office, told them both to have a seat. Then another inspector and I escorted the driver into the search room and searched -- searched him, had him remove everything from his pockets, his clothing and came back negative.

"Then I escorted the passenger --

"Q Who was the passenger?

"A Johnnie, and escorted him into the search room and told him to empty everything out of his pockets in which he did and then I told him to remove his coat.

"As he removed his coat, there was a -- two rubber contraceptives tied with string around his left bicep."

Appellant, Johnnie Charles Murray, testifies as to the same effect at page 67, lines 5 through 9, of the Reporter's Transcript:

> "Q Now, when you got over to the customs station, what occurred there?
>
> "A Well, he took us in the room and told me to undress, so I just undressed. He said, 'This is what I want,' and he took it off."

This is further confirmed by the testimony of appellant, Lonnie Melvin Murray, at page 103, line 24, to page 104, line 9, of the Reporter's Transcript:

> "Q Then what happened?
>
> "A Oh, then he took me into the side room and he asked me, 'You sure you haven't got no narcotics?' I said, 'No, I haven't got any.' He said, 'What about your brother?' I said, 'He haven't either.' I said, 'We don't mess with it,' you know.
>
> "So he said, 'Well, pull off your clothes,' and I asked him, 'Well, you people always do this to people that come over to have fun?' So he said, 'This is regular routine,' so I started pulling off my clothes as he told me to pull off certain pieces and this and that."

It is very apparent that the time the strip search was conducted, there was no basis for a real suspicion that Johnnie had contraband in his possession.

Therefore, the evidence was illegally obtained, and should be suppressed. Without the evidence illegally obtained, there was no evidence to support the conviction, and the judgment of conviction should be reversed.

5. There was insufficient evidence to find appellant, Lonnie Melvin Murray, guilty.

Appellee agrees that Lonnie's conviction rests upon the inference arising from possession of the drug. Appellee also states that the court inferred actual knowledge. However, since any inference of actual possession is based upon exactly the same circumstances as those supporting any finding of "possession," the conviction is based upon possession. Appellee appears to rely somewhat upon an argument made by appellee at trial concerning a string tied on Johnnie's arm. Appellee failed to establish that the string could not have been tied by Johnnie himself and the court in no way considered this argument in deciding this case.

Appellee states that Lonnie had constructive possession of the contraband. The evidence against Lonnie is concededly circumstantial, and circumstantial evidence is insufficient to establish constructive possession in one person if possession is solely in another. (See Bass vs. United States (8 Cir. 1964) 326 F.2d 884.)

The rule as to the sufficiency of evidence in a situation such as this is set forth in Lee vs. United States (9 Cir. 1967) 376 F.2d 98, 101:

> "The test to be applied in determining the sufficiency of the evidence is whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt.'"

Appellee disregards the fact that the contraband was not found in the car. The contraband was found upon the arm of Johnnie in a room well removed from the car. Lonnie's connection with the contraband is simply that when Johnnie was sitting in the car the contraband was also within the physical limits of the car. In effect, appellee is arguing that Lonnie had dominion and control over the body and person of Johnnie.

In Hernandez vs. United States (9 Cir. 1962) 300 F.2d 114, 116, "possession" is explained as follows:

> "* * * a defendant has 'possession' of narcotic drugs within the meaning of the statute whenever the evidence, direct or circumstantial, shows that he personally shared physical custody of the narcotic drugs or had dominion and control over them" (emphasis added).

However, the court warns as follows at page 119 of the Hernandez case:

> "But 'possession' of a third person 'imputed' to the defendant is not, in legal terminology, 'possession' of the person to whom it is attributed at all. It is instead the physical or constructive possession of another, for which the defendant is to be made liable."

The trial court did not make any findings of fact or conclusions of law. However, at pages 136 to 138 of the Reporter's Transcript, the court outlines the evidence for use on appeal. The evidence relied upon by the court is summarized in appellants' opening brief at pages 13 and 14

and need not be repeated. The trial court did not find any dominion and control by Lonnie, and did not even discuss the question. The court found a common plan between the brothers to go to Tijuana. Having found this common plan, the trial court proceeded with slight circumstantial evidence to connect Lonnie with the contraband. Then, based upon such circumstances, possession is imputed to Lonnie. It appears that in so doing the trial court based the liability of Lonnie for the possession of Johnnie upon the special rules of criminal responsibility drawn from the law of conspiracy. It is important to note that the appellants were not charged with conspiracy and the court did not find any conspiracy. Therefore, it must be concluded that the facts do not support a conviction of conspiracy.

As stated in the Hernandez case at page 121:

> "It would be anomalous indeed if proof of a common scheme or plan, admittedly insufficient to constitute a conspiracy violative of Section 174 because proof of the requisite specific knowledge was lacking, could nonetheless provide the basis for imputing the same specific knowledge for the purposes of conviction of the substantive offenses under the same statute."

The trial court apparently accepted the doctrines of vicarious liability, and the rule in this Circuit is that such liability cannot be imputed.

This rule has recently been affirmed in this Circuit in Jefferson vs. United States (9 Cir. 1965) 340 F.2d 193.

To sustain that conviction, the finding must be based upon the statutory rule of evidence arising from control of the narcotics, and not upon imputed knowledge arising from knowledge of some other alleged conspirator. Even more recently, this question has been considered by the Tenth Circuit in Mason vs. United States (10 Cir. 1967) 383 F.2d 107. Each defendant must have specific knowledge of the importation. Specific knowledge of illegal importation by one defendant cannot be imputed to other defendants.

Inasmuch as the circumstances surrounding the trip to Mexico by Johnnie and Lonnie and the subsequent finding of contraband on the person of Johnnie does not exclude, in a reasonable mind, every hypothesis but that of Lonnie's guilt, the judgment of conviction must be reversed.

Respectfully submitted,

JOSEPH A. FILIPPELLI

JOSEPH A. FILIPPELLI

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH A. FILIPPELLI

JOSEPH A. FILIPPELLI

INDEX TO APPENDIX

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES	)	
	)	
COURT OF APPEALS	)	No. 22340
	)	
FOR THE NINTH CIRCUIT	)	

JOSEPH A. FILIPPELLI hereby certifies that he is an attorney admitted as an attorney and counselor of the United States Court of Appeals for the Ninth Circuit, and is a person of such age and discretion to be competent to serve papers.

That on September 4, 1968, he served a copy of the attached Appellants' Reply Brief by placing said copy in an envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address and by depositing said envelope and contents in the United States mail at the Main Post Office Building, Seventh and Mission Streets, San Francisco, California.

Mobley Milam, Esq.
Assistant United States
Attorney
325 West "F" Street
San Diego, California 92101

JOSEPH A. FILIPPELLI

Subscribed and sworn to
before me this 4th day
of September, 1968.

NOTARY PUBLIC
State of California